

APPEAL NO. 021985
FILED SEPTEMBER 18, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 8, 2002. The hearing officer determined that the appellant (carrier) is not entitled to a reduction of the respondent's (claimant) income benefits for contribution from a prior compensable injury.

The carrier appealed, contending that the same injury was being rated twice and that it was entitled to a 65% contribution. The file does not contain a response from the claimant.

DECISION

Affirmed.

Section 408.084(a) provides that, at the request of an insurance carrier, the Texas Workers' Compensation Commission (Commission) may order that impairment income benefits and supplemental income benefits may be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. In determining the reduction in benefits because of contribution from a prior compensable injury, the Commission is to consider the "cumulative impact from the compensable injuries on the employee's overall impairment" Section 408.084(b). The parties stipulated that the claimant sustained a compensable (low back) injury on February 7, 2000 (the 2000 injury), and a compensable (low back) injury on February 8, 1996 (the 1996 injury). The hearing officer further made an unappealed finding that the claimant "had a compensable injury in 1989 to the lumbar spine, [the 1989 injury], which resulted in a laminectomy."

There are no records in evidence regarding the 1989 injury. Several of the doctors make reference to the 1989 injury and the designated doctor for the 2000 injury states that claimant had "a workers' comp injury in 1989, a right L5-S1 laminectomy." The claimant apparently returned to work and sustained the 1996 injury. Dr. P treated that injury and in May 1997, certified that the claimant at maximum medical improvement with a 13% impairment rating (IR). That rating consisted of 12% impairment from Table 49, Section IV B of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and 1% impairment for lumbar left lateral flexion loss of range of motion (ROM). There was no surgery for the 1996 injury and the hearing officer speculates that the 12% impairment was "the rating for an operated back [the 1989 injury]." The hearing officer also noted that the 13% IR for the 1996 injury "was apparently not disputed."

The claimant returned to work after the 1996 injury apparently in July or August 1996. The claimant initially was on light duty but eventually returned to his regular job (which probably exceeded Dr. P's restrictions). The carrier emphasizes the restrictions "showing that the impairment from the 1996 injury carried forward to the 2000 injury." In any event, the claimant subsequently sustained the 2000 injury for which he had surgery on May 9, 2000. The surgery was a three-level fusion between L3 and S1 with pedicle screws. Dr. W was appointed as the designated doctor and in a report dated May 22, 2001, assessed a 20% IR based on 12% impairment from Table 49, Section IV C plus 2% impairment for a second additional level, for the 14% impairment from Table 49 of the AMA Guides; 6% impairment for lumbar flexion and extension (0% for left lateral flexion) and 1% impairment for neurologic deficit combined to form the 20% IR.

The carrier seeks contribution of 12/14 of the specific disorder, and some portion of the loss of ROM arguing the "specific [numerical] ratings or decreases in [ROM] were fairly identical." The hearing officer comments that there was no medical evidence that discusses the cumulative impact of the prior injuries with the latest compensable injury, that "at most the medical records acknowledge prior injuries (i.e. in 1989 and 1996)," and that there was evidence that the claimant suffered only a lumbar strain in 1996. The hearing officer found the 1% impairment for neurological deficit was new and related to the 2000 injury and that the ROM was for different aspects and was not overlapping (the 1996 ROM was for left lateral extension while the 2000 ROM was for flexion and extension). The hearing officer also found that the designated doctor for the 2000 injury was aware of the 1989 injury that resulted in surgery but did not include that in his IR.

Whether there is a cumulative impact, and, if so, the amount of such cumulative impact, is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. It is well-settled that "[s]imply proving the occurrence of a previous compensable injury will not sustain the carrier's burden to prove the interaction of that injury with the current one on the present impairment." Texas Workers' Compensation Commission Appeal No. 971348, decided August 28, 1997. The consideration of the cumulative impact from prior injuries requires an assessment not only of the impairment from previous injuries, but also an analysis of how the injuries work together. Texas Workers' Compensation Commission Appeal No. 021413, decided July 11, 2002. The carrier had the burden of proof in showing the cumulative impact from the 1996 injury on the 2000 injury. The carrier failed to show a cumulative impact, and only a difference in the numbers.

The hearing officer's decision is supported by the evidence. Having reviewed the record, we are satisfied that the challenged determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge